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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOSE A. MARTINEZ, Plaintiff and Respondent, v. MATHEW ENTERPRISE, INC., Defendant and Appellant.	A153760 (Alameda County Super. Ct. No. HG-16801752)

On October 18, 2015, Jose A. Martinez purchased a 2015 Dodge Challenger from Mathew Enterprise, Inc., doing business as Stoneridge Chrysler Jeep Dodge (Stoneridge). He signed a retail sales installment contract and took possession of the car that same day. Martinez later sued Stoneridge, alleging it violated the Automobile Sales Finance Act (the Act) (Civ. Code, § 2981 et seq.) by failing to timely provide him with a copy of the contract.[1] Stoneridge appeals from the judgment in Martinez's favor, contending it can belatedly raise a safe harbor defense. We affirm.

BACKGROUND

A.

The Act is a consumer protection law governing the sale of motor vehicles where the buyer finances at least some of the purchase price. (*Rojas v. Platinum Auto Group, Inc*. (2013) 212 Cal.App.4th 997, 1002.) It "serves to protect motor vehicle purchasers from abusive selling practices and excessive charges by requiring full disclosure of all

[1] Undesignated statutory references are to the Civil Code.

items of cost." (*Nelson v. Pearson Ford Co*. (2010) 186 Cal.App.4th 983, 999–1000, disapproved on other grounds by *Raceway Ford Cases* (2016) 2 Cal.5th 161, 176, 180.)

The Act also requires that, prior to delivery of a vehicle to a buyer, the seller must provide the buyer certain documents, including "a fully executed copy of the conditional sale contract." (§ 2981.9.) With some exceptions, a violation of section 2981.9 renders the contract unenforceable. (§ 2983, subd. (a) ["if the seller . . . violates any provision of Section 2981.9 . . . the conditional sale contract shall not be enforceable, except by a bona fide purchaser, assignee, or pledgee for value, or until after the violation is corrected as provided in Section 2984"]; *Nelson v. Pearson Ford Co., supra,* 186 Cal.App.4th at p. 1010.) If the seller violates the Act, the buyer may elect to retain the vehicle and continue the contract in force or elect to rescind the contract and return the vehicle. (§ 2983.1, subd. (d); *Bermudez v. Fulton Auto Depot, LLC* (2009) 179 Cal.App.4th 1318, 1324.)

The Act also includes a safe harbor provision, which "allows the dealer . . . a period of either 20 or 30 days . . . to correct any violations of the [Act] in the contract. If the contract is corrected during this period, the corrected violation cannot be the basis of an action against the dealer." (*Bermudez v. Fulton Auto Depot, LLC, supra,* 179 Cal.App.4th at p. 1324, citing § 2984.)[2]

B.

Martinez sued Stoneridge, alleging violations of the Act, Consumer Legal Remedies Act (§ 1750 et seq.), Song-Beverly Consumer Warranty Act (§ 1790 et seq.), unfair competition law (Bus. & Prof. Code, § 17200 et seq.), and false advertising law

[2] Section 2984 provides: "Any failure to comply with any provision of this chapter (commencing with Section 2981) may be corrected by the holder, provided, however, that a willful violation may not be corrected unless it is a violation appearing on the face of the contract and is corrected within 30 days of the execution of the contract or within 20 days of its sale, assignment or pledge, whichever is later, provided that the 20-day period shall commence with the initial sale, assignment or pledge of the contract, and provided that any other violation appearing on the face of the contract may be corrected only within such time periods. . . ."

(*id*., § 17500 et seq.). Martinez's cause of action under the Act was based on, among other things, his allegation Stoneridge did not provide him with a copy of the retail sales installment contract at the time of signing and delivery of the car. He only received a copy "approximately two to four days after the sale." Stoneridge answered Martinez's complaint, generally denying its allegations and raising 22 affirmative defenses. However, it did not raise the Act's safe harbor provision (§ 2984).

At a bench trial, Martinez testified that a Stoneridge salesperson told him the price of the car was $39,475, as shown on a "window sticker" Martinez had printed from Stoneridge's Web site. Martinez told Stoneridge's finance manager, Amir Khandel, he would pay most of the agreed $18,000 down payment via debit card but would need to return home to retrieve the remaining cash. Martinez testified they rushed to fill out the paperwork so he could get the cash and return before closing.

Martinez acknowledged his signature appears at various places on the retail installment sales contract, which set forth the price of the car (before financing) as nearly $50,000. After signing, Khandel ran Martinez's debit card for $14,000, and then Martinez drove home to obtain the remaining $4,000. When Martinez returned to the dealership, the salesperson took the cash inside and returned with the keys and owner's manual. Martinez drove the car off the lot but had no copy of the contract. Martinez returned to the dealership a couple of days later, at which time Khandel gave him an envelope containing the contract. When he looked at the contract, Martinez realized, for the first time, the true price of the car.

Khandel testified it was his standard practice to give customers a copy of their paperwork immediately after signing and before leaving his office. He denied Martinez's account that a copy of the contract was not provided until two days after the car was delivered.

C.

In its statement of decision, the trial court found section 2981.9 was violated, albeit "inadvertently" or "negligently," and concluded Martinez is entitled to rescission of the contract. It explained: "Khandel testified credibly that he follows a certain standard

practice in how he handles all sales and all financing transaction[s] with his customers, and that he is confident he did so in this case. However, . . . this case presented an unusual circumstance that resulted in a likely inadvertent but significant divergence from that practice. It is not disputed that after [Martinez] left Khandel's office, he had to go home to obtain the $4,000 cash to complete the down payment and that he did not return to Stoneridge until almost closing time. In other words, the 'deal' was not yet 'done' when [Martinez] left Khandel's office. . . . Thus, it is reasonable that Khandel did not immediately hand over the envelope with [Martinez's] contract documents to him when Martinez left Khandel's office, since [Martinez] had not yet completed paying his $18,000 down payment and the [v]ehicle would not be delivered until that was done. The evidence also supports a reasonable inference that [Martinez] may have simply failed to take the envelope that Khandel had prepared when he left Khandel's office as he was in a big hurry to get the $4,000 cash and return to the dealership before it closed that evening. In either event, when [Martinez] later returned and the deal was complete, the envelope containing the contract documents was apparently forgotten and . . . was not delivered that evening."

With respect to liability under the Act, judgment was entered in favor of Martinez. The contract was rescinded, Martinez was ordered to return the car, and Martinez's payments (totaling approximately $33,000) were ordered reimbursed. On Martinez's remaining causes of action, the trial court ruled in favor of Stoneridge.

Stoneridge moved to vacate the judgment (Code Civ. Proc., § 663), arguing the statutory safe harbor (§ 2984) was triggered by the court's finding Stoneridge had inadvertently failed to furnish the contract, coupled with Martinez's concession he received the contract within a few days of the sale. The trial court denied the motion, concluding Stoneridge forfeited the safe harbor defense by failing to timely assert it. Stoneridge appeals solely from the judgment, however, not from the denial of the motion to vacate.

DISCUSSION

Stoneridge contends any violation of section 2981.9 was corrected when a copy of the contract was provided to Martinez within days of the sale and thus falls within the safe harbor provision (§ 2984). Assuming the safe harbor provision applies, we conclude Stoneridge has forfeited its argument.

Timely correction under the safe harbor provision exempts the dealer from liability under the Act. (*Munoz v. Express Auto Sales* (2014) 222 Cal.App.4th Supp. 1, 10.) However, it is an affirmative defense, which the defendant is charged with proving by a preponderance of the evidence. (*Ibid*.) Stoneridge forfeited the safe harbor affirmative defense by failing to plead it in its answer. (*California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442; Code Civ. Proc., § 431.30, subd. (b)(2) [answer "shall contain" any "new matter constituting a defense"].)

Stoneridge also failed to raise the safe harbor defense at trial. Instead, it focused on Khandel's testimony that his standard practice was to deliver a copy of the contract at signing. In fact, the trial court asked defense counsel, during closing argument, "You do agree with [Martinez], that if the Court were to determine as a factual finding that [he] did not receive a copy of the contract at the time that he was delivered the car, . . . [t]hat is violation of the statute, and no matter what else occurred that would be grounds for rescission[?]" Defense counsel responded, "That would be correct, Your Honor." The trial court also issued a tentative decision in which it indicated section 2981.9 was violated, albeit "inadvertently" or "negligently," and concluded Martinez is entitled to rescission of the contract. Although Stoneridge objected to the tentative, it did not address section 2984. Thus, even if we could overlook Stoneridge's failure to plead the defense, it again forfeited its current argument by waiting until its motion to vacate the judgment to raise it. (See *Sinai v. Mull* (1947) 80 Cal.App.2d 277, 283.)

Stoneridge correctly observes that we have discretion to consider a new theory on appeal if it is an issue of law based on undisputed facts. (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1237–1238.) The general rule, of course, is that a party may not present a new theory for the first time on appeal. However, we may make an

exception when the new theory presents a pure legal question and no new evidence could have been presented to alter the facts. (*Ibid*.) Stoneridge does not convince us the exception applies here. In the trial court, Martinez raised other violations of the Act that may not have been subject to the safe harbor. This is not an appropriate case to exercise our discretion because, had Stoneridge raised the safe harbor as an affirmative defense, Martinez may have more vigorously pursued these (or other) theories with additional facts and evidence. (*Id*. at p. 1238 [declining to consider new theory on appeal where, had the appellant presented it below, respondent may have presented evidence to refute it].)

We need not address the parties' additional arguments.

DISPOSITION

The judgment is affirmed. Martinez is entitled to his costs on appeal.

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.

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